Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	)	WC Docket No. 16-106

REPLY COMMENTS OF ADTRAN, INC.

ADTRAN, Inc. ("ADTRAN") takes this opportunity to reply to several issues raised in the recent Oppositions to the Petitions for Reconsideration of the Commissions privacy rules applicable to Broadband Internet Access Service ("BIAS") providers.[1] ADTRAN has been an active participant in the Commission's previous Open Internet rulemaking and this related broadband privacy proceeding. As a manufacturer of telecommunications equipment used in the Internet and Internet access networks, ADTRAN supports a dynamic, robust and widely-accessible Internet. However, ADTRAN is concerned that the burdensome and asymmetric privacy obligations imposed on BIAS providers under the current Commission rules -- and supported by the Oppositions to the Petitions for Reconsideration -- will distort the marketplace and confuse consumers. ADTRAN thus supports reconsideration by the Commission.

ADTRAN, founded in 1986 and headquartered in Huntsville, Alabama, is a leading global manufacturer of networking and communications equipment, with an innovative portfolio of solutions for use in the last mile of today's telecommunications networks. In addition,

---

[1] *Public Notice*, Petitions For Reconsideration of Action in Rulemaking Proceeding, 82 Fed Reg 10999 (February 17, 2017).

ADTRAN's Bluesocket product family includes a suite of innovative wireless LAN solutions that combine virtualized, cloud-enabled control and management with high-performance access points. ADTRAN wireless solutions are ideal for large enterprises, Small and Medium Businesses (SMBs), educational institutions and government agencies seeking to expand wireless coverage to meet the growing demand for always-on wireless access. ADTRAN's equipment is deployed by some of the world's largest service providers, as well as distributed enterprises and small and medium businesses. ADTRAN thus brings an expansive perspective to this proceeding, as well as an understanding of the impact of regulation on network operators' investment decisions.

In its initial comments in this proceeding, ADTRAN explained that it was particularly troubled by the Commission's proposal to develop and apply privacy requirements and limitations that would apply to BIAS providers, but not to other participants in the Internet ecosphere.[2] The problems with such differing privacy obligations are two-fold. First, BIAS providers compete against edge providers for advertising dollars, and the imposition of significantly more restrictive and burdensome privacy obligations just on BIAS providers will distort that marketplace. Second, and equally important, customers are likely to be confused by the different treatment of their confidential information, depending on the classification of a service provider as a telecommunications carrier or not. And unfortunately, both of those effects are likely to dampen broadband investment and adoption. As demonstrated in the Petitions for Reconsideration, the public interest would be much better served if the Commission abandoned this overly-prescriptive regulatory approach and simply followed the FTC's lead so that the same strong but flexible privacy obligations applied throughout the Internet ecosphere.

[2] Comments of ADTRAN in WC Docket No. 16-106, filed May 27, 2016.

ADTRAN urges the Commission to adopt on reconsideration privacy rules for BIAS providers that mirror the FTC's rules. Thus, ADTRAN believes the Commission can safely ignore the "straw man" arguments of several of the Oppositions that decry the harms that could result from the absence of any privacy regulations whatsoever applying to BIAS providers.[3] Likewise, the Commission need not worry about the horrors posited by CDD with regard to invasions of the privacy interests of children:

> If ISPs were permitted to use children's web browsing and app usage data without parental permission to market directly to children, or to sell this information to others for marketing, advertisers would have a much greater ability to take unfair advantage of children.[4]

Under the FTC's scheme, children's information is treated as sensitive,[5] so that BIAS providers would need parental opt-in approval for use of that information under FCC rules that mirrored FTC treatment.

Several of the Oppositions seek to have the Commission deny the petitions for reconsideration on procedural grounds, claiming that the petitions merely raise arguments that were already considered and rejected by the Commission. For example, CDT asserts that:

> The Supreme Court has recognized a presumption against "changes in current policy that are not justified by the rulemaking record." The Commission should not reverse course

---

[3] *E.g.*, Opposition of Center for Democracy & Technology (hereafter cited as "CDT") at p. 1; Opposition of The Center for Digital Democracy and Campaign for a Commercial Free Childhood (hereafter cited as "CDD") at p. 1; Opposition of Access Humboldt *et al.* (hereafter cited as "Public Interest Commenters") at p. 1; Opposition of Consumers Union at p. 1.

[4] Opposition of CDD at p. 7.

[5] Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6501 *et seq*. and 16 C.F.R. Part 412 (children's online information security and privacy).

> based on a mere rehashing of arguments already thoroughly addressed in this proceeding.[6]

As the Supreme Court made clear in the *Fox* decision, an administrative agency is allowed to change its mind, as long as it acknowledges that it is doing so, and provides a reasoned explanation for the changes.[7] And ironically, the Commission's need to develop privacy rules applicable to BIAS only arose because the Commission changed its mind in re-classifying BIAS as a telecommunications service, notwithstanding the absence of different facts in that case.[8] As the Petitions for Reconsideration make clear, there are very good reasons for reconsidering the

---

[6] Opposition of CDT at p. 5 (footnote omitted). Similar arguments were also made in the Opposition of Public Interest Commenters at pp. 3-4 and Opposition of Public Knowledge *et al.* at pp. 1-3.

[7] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

[8] *United States Telecom Association v. FCC*, 825 F.3d 674, 709 (DC Cir, 2016):

> But we need not decide whether there "is really anything new" because, as the partial dissent acknowledges, *id.* the Commission concluded that changed factual circumstances were not critical to its classification decision: "[E]ven assuming, *arguendo*, that the facts regarding how [broadband service] is offered had not changed, in now applying the Act's definitions to these facts, we find that the provision of [broadband service] is best understood as a telecommunications service, as discussed [herein] ... and disavow our prior interpretations to the extent they held otherwise." 2015 Open Internet Order, 30 FCC Rcd. at 5761 ¶ 360 n. 993.

ADTRAN contends that the Commission's action in re-classifying BIAS as a telecommunications service was incorrect, not because an agency cannot change its mind, but because classification as a telecommunications or information service is a fact-based inquiry, not simply a policy choice. *See, Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (citing *NARUC I*, 525 F.2d at 644)("Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve."). Arguably the Commission could have decided ***as a policy choice*** in the Open Internet proceeding to require the unbundling of the telecommunications component of the BIAS information service -- if the record justified such a decision – akin to the Computer III open network architecture rules, but that is not what the Commission did.

Commission's decision to adopt different rules for BIAS providers than the FTC applies to other competing participants in the Internet marketplace.

Free Press in its Opposition goes even further, asserting that the FCC's procedural rules for petitions for reconsideration require the dismissal of the Petitions:

> Wisely, the Commission's rules ***require*** denial of reconsideration petitions that "[f]ail to any material error, omission, or reason warranting reconsideration" or "[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding."[9] (emphasis added)

However, the provision cited by Free Press regards the ability of a Bureau to dismiss petitions that "plainly do not warrant consideration by the Commission," and that provision is permissive, not mandatory.[10] Moreover, the record demonstrates that reconsideration is plainly warranted.

The Oppositions also contend that the Commission should reject the Petitions for Reconsiderations' complaints concerning the disparate treatment of BIAS providers under the FCC's privacy rules and the treatment of other Internet companies under the FTC's privacy rules. ADTRAN disagrees with these arguments by the Oppositions. ADTRAN acknowledges that the Commission's decision to re-classify BIAS as a Title II service divested the FTC of jurisdiction.[11] Some of the Oppositions suggest that the fact that two different agencies have

---

[9] Opposition of Free Press at pp. 5-6 (citing 47 C.F.R. § 1.429(l)).

[10] *Cf. Anderson v. Yungkau,* 329 U.S. 482, 485 (1947):

> The word "shall" is ordinarily "the language of command." *Escoe* v. *Zerbst,* 295 U.S. 490, 493. And when the same Rule uses both "may" and "shall," the normal inference is that each is used in its usual sense — the one act being permissive, the other mandatory. See *United States* v. *Thoman,* 156 U.S. 353, 360.

[11] *E.g.,* Opposition of CDT at p. 7. As ADTRAN explained above, however, the Commission was wrong to re-classify BIAS as a telecommunications service. *See* n. 8, *supra*.

jurisdiction over the Internet marketplace means that disparate treatment is inevitable.[12] And Free Press goes so far as to argue that the FCC should not take into account how others in the marketplace are treated.[13] ADTRAN disagrees. The fact that the FTC has jurisdiction over other players in the on-line marketplace does not mean that differing standards are "inevitable." Indeed, as ADTRAN explained in its initial comments in response to the Notice of Proposed Rulemaking, having disparate standards confuses customers and adversely affects competition in the advertising market, to the detriment of the public interest.

The Oppositions also claim that disparate treatment of BIAS providers is justified because of the BIAS providers' alleged unique access to customer information.[14] According to CDT, "In order to access the internet, customers have no choice but to disclose large amounts of personal information, including browsing history and location information, to their ISPs."[15] As

---

[12] *E.g.*, Opposition of CDT at p. 8 ("However, the existence of two different, sector-specific standards for protecting internet users' privacy is inevitable under current U.S. law."). *See also*, Opposition of Public Interest Commenters at p. 4 ("However, the FCC is not obligated to, nor should it, enact the exact same privacy regime as the FTC.").

[13] Opposition of Free Press at p. 4 ("[The FCC] acted within its lawful authority to protect customer proprietary information under Section 222, and properly determined that the role of edge providers in the online advertising market has no bearing on that authority."); Opposition of Free Press at p. 9 ("Edge providers' scope of access to their customer's information is immaterial to the question of how the Commission should effectuate Section 222's customer protection mandate.").

[14] *E.g.*, Opposition of CDD at p. 5 (BIAS providers have a unique "gatekeeper" access to information). *See also*, Opposition of CDT at p. 21 ("BIAS providers don't just have access to a few disparate pieces of web browsing data. They have access to a near-complete picture of the websites, and possibly individual pages, a subscriber visits."); Opposition of Consumers Union at p. 2 ("A BIAS provider has an intimate, all-encompassing picture window into its customers' behavior."); Opposition of Consumers Union at p. 3 ("BIAS providers have a different and far more intimate knowledge of a consumers' online activities, no matter which edge providers the consumer elects to visit.").

[15] Opposition of CDT at p. 10.

other commenters point out, those customers have the option of using encryption or proxy services that would limits BIAS providers access to the customer's information.[16] Moreover, BIAS providers do not have relatively greater access to customer information, compared to edge providers. As Richard Bennett observed:

> The large error is the implication that Google can only track us when we're using Google and Facebook can only track us when we're using Facebook. In fact, Internet advertising networks embed trackers in web pages of all kinds, even non-commercial ones such as those operated by "consumer groups". These trackers record our movements across the web even though they don't show Google and Facebook logos.[17]

The Oppositions are wrong -- stricter rules applicable only to BIAS providers are not justified on the basis of any superior access to customer information.

Several of the Oppositions contend that reconsideration is unnecessary because the FCC rules are fairly similar to the FTC treatment of edge providers. For example, CDT asserts that "the report and order already mirrors the FTC's guidance and enforcement regime in many significant ways."[18] Likewise, Public Knowledge claims that:

> The broadband privacy rules implement the principles contained in the *2012 FTC Privacy Report*, but apply those principles to ISPs. Therefore, the *2012 FTC Privacy Report* is insufficient basis for any argument that all web browsing and app usage history is non-

---

[16] *E.g.*, Comments of Peter Swire in WC Docket No. 16-106, filed May 24, 2016; Reply Comments of Peter Swire in WC Docket No. 16-106, filed July 6, 2016; Comments of CenturyLink, Inc., WC Docket No. 16-106 at p. 8 ("While not yet pervasive, the availability of easy-to-use proxy services, including but not limited to VPNs, is clearly on the rise, and use is set to grow dramatically.").

[17] Comments of Richard Bennet in WC Docket No. 16-106, filed March 6, 2017. See also, Comments of Tech Knowledge in WC Docket No. 16-106, filed March 6, 2017 at pp. 2-5.

[18] Opposition of CDT at p. 16. See also, Opposition of CDT at 14 ("This flexible notice-and-choice approach is consistent with the FTC's privacy regime and with the FIPPs."); Opposition of CDT at p. 17 ("At their cores, the broadband privacy rules and the FTC's privacy standards are both 'notice-and-choice' regimes in keeping with the Fair Information Practice Principles (FIPPs)."); Opposition of CDT at p. 18 ("The Commission also harmonized its rules with FTC standards by adopting a sensitivity-based framework at the request of Petitioners").

> sensitive, and classifying that information as sensitive is in now way [*sic*] inconsistent with the FTC's framework.[19]

And CDT brushes aside one of the differences in treatment – requiring opt-in instead of opt-out – as not very significant:

> The rules give subscribers meaningful choice without jeopardizing the flexibility of ISPs to use data. …. The rules do not prohibit providers from using customer data for any purpose, including marketing. They simply require that providers notify their customers and get consent to use proprietary information for purposes other than providing the subscription service.[20]

These arguments of "similarity" bring to mind the old car rental company ads that pointed out the problems when the alternative is "not exactly" the same.[21] In this case, the difference in categorization of particular information as sensitive – and thus triggering opt-in instead of opt-out requirements – makes a big difference in the costs incurred by BIAS providers in obtaining authority to use the information and the amount of information that can be used.[22] The resulting adverse effects of disparate treatment on the market for on-line advertising is particularly critical, given the market power of the largest incumbent.[23] "Almost the same" is not sufficient, and will disserve the public interest.

One of the Oppositions also try to paint the more restrictive FCC rules as beneficial to BIAS providers, with CDT claiming that: "Far from reinventing the regulatory wheel, the report

---

[19] Opposition of Public Knowledge *et al*. at p. 6.

[20] Opposition of CDT at p. 12.

[21] *E.g.,* "There's Hertz, and not exactly" – *https://www.youtube.com/watch?v=EuOHHA0KTww*.

[22] *E.g.,* Thomas Lenard and Scott Wallsten, "An Economic Analysis of the FCC's Privacy Notice of Proposed Rulemaking," filed in WC Docket No. 16-106 on May 25, 2016 at pp. 25-27.

[23] According to one research firm, Google's share of the market is projected to grow to 80% by 2019 - https://www.recode.net/2017/3/14/14890122/google-search-ad-market-share-growth.

and order simply provides the clarity and uniform standards that ISPs need in order to comply with statutory law and avoid unexpected enforcement actions."[24] While clarity can be beneficial, it loses those positive benefits when the prescribed rules create problems of their own. CDT also attempts to justify the need for more restrictive use of search information by citing a single anecdote:

> Misuse of this information not only undermines internet users' trust but can also cause serious tangible harm. For example, one internet user reported searching for help with a potential alcoholism problem only to see targeted ads for the nearest liquor stores.[25]

While such mis-placed advertising can be problematic, retaining the FCC's current privacy rules does nothing to solve such concerns, because websites and search engines that use consumers' information for targeted advertising are not subject to the same constraints.

Finally, several of the Oppositions seek to justify the need for restrictive FCC privacy rules because meaningful choice is obviated by inadequate or confusing disclosures by the BIAS providers.[26] ADTRAN believes that consumers deserve clear and accurate disclosures of the BIAS providers' privacy policies and the impacts of the opt-out or opt-in options available so that consumers can make effective selections. However, the solution to the problems of confusion raised by the Oppositions is more effective implementation of the requirement that

---

[24] Opposition of CDT p. 10.

[25] Opposition of CDT pp. 19-20.

[26] *E.g.*, Opposition of CDD at p. 8 ("Privacy policies, which are rarely read, typically do not provide sufficient information. The information these policies do provide is so full of jargon that most consumers would not understand it."); Opposition of Public Interest Commenters at p. 3 ("Because privacy policies are often dense, unclear, and confusing, the default rules are important for protecting consumers against practices that may be obscured or not explained well. Opt-in protection for certain uses and disclosure of customer information will better protect consumers against those harmful practices."); Opposition of Consumers Union at pp. 2-3 ("When consumers are unable to effectively protect themselves (because, for instance, BIAS providers write such complicated privacy policies that they are impossible to comprehend), then it is important that the Commission take an active role to better ensure that they can.").

consumers have access to "clear and conspicuous, comprehensible, and not misleading information about what customer data the carriers collect; how they use it; who it is shared with and for what purposes; and how customers can exercise their privacy choices"[27] – not imposition of different and more restrictive privacy requirements on BIAS providers.

In sum, ADTRAN believes that the Oppositions have failed to raise any legitimate grounds for not reconsidering the *Privacy Order*. As explained herein and in ADTRAN's previous comments, the Commission should modify the privacy rules so that BIAS providers are not subject to more restrictive requirements than the other participants in the Internet marketplace. Simply continuing to apply the rules adopted in the *Privacy Order* will distort the marketplace and confuse customers, and thereby adversely affect broadband deployment and adoption. The public interest would be much better served if the Commission followed the FTC's lead so that the same strong but flexible privacy obligations applied throughout the Internet ecosphere.

Respectfully submitted,
ADTRAN, Inc.

By: ____/s/_____
Stephen L. Goodman
Butzel Long, PLLC
1909 K Street, NW, Suite 500
Washington, DC 20006
(202) 454-2851
Goodman@butzel.com

Dated: March 16, 2017

---

[27] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, 31 FCC Rcd 13911 (2016)(hereafter cited as "*Privacy Order*") at ¶ 122.